No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,
vs.
CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN and EDDIE HARGROVE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF ALABAMA

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Petitioner Pacific Mutual Life Insurance Company ("Pacific Mutual") respectfully submits its reply to Respondents' Brief as follows:

ARGUMENT

A. The Due Process Clause Of The Fourteenth Amendment Requires That The Appropriate Governmental Authority Define Punishable Conduct And Set The Permissible Range Of Punishment To Be Imposed By Punitive Damages Prior To Commission By The Defendant Of The Conduct Determined To Be Punishable.

Respondents have asserted a number of arguments for the Due Process viability of Alabama punitive damages law and the jury instruction in this case which that law authorized. While some of the propositions advanced by Respondents are correct statements of the law in the abstract, none support Respondents' position here.

1. Due Process Requires More Than Notice, Hearing And A Neutral Decisionmaker. It Also Requires Procedures Which Do Not Give Arbitrary Power To Juries Or Courts To Punish Selectively And To Determine The Limits Of Punishment After The Fact.

Respondents suggest that Alabama punitive damages procedures are valid because they give notice, an opportunity to be heard, and a neutral decisionmaker [Resp. Br. 17-18].

Due Process, however, requires more. Arbitrary and discriminatory enforcement of laws, including the determina-

tion of punishment, violates Due Process [*United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966)], and mandates fundamental fairness at the hands of the law for all defendants at all times in all circumstances [*Lassiter v. Dept. of Social Services*, 452 U.S. 18, 24-25 (1981)].

It is this aspect of Due Process which is relevant to the Constitutional inquiry here. Pacific Mutual submits that the power given to the jury below[1] to determine whether or not, and how much, to punish based only upon the personal predilections and subjective reactions of the twelve individuals who happened, on this single occasion, to be empowered to determine the limits of punishment in this case, conferred such arbitrary power, and therefore violated Pacific Mutual's Due Process rights.

2. The Historical Acquiescence By Courts In Granting Standardless Discretion To Juries To Impose Punishment Through Punitive Damages Awards Does Not Insulate The Practice From Constitutional Review.

Respondents contend that because jury instructions substantially identical to that given below have been in use and upheld for 200 years, the Due Process compliance thereof is

[1] Respondents suggest that Pacific Mutual waived any right to raise Due Process Clause challenges to the jury instruction below, because no specific objection was made thereto, and no alternative instruction was submitted. However, in an unsuccessful motion for directed verdict [J.A. 37], Pacific Mutual's trial counsel challenged the constitutionality of Alabama procedures generally under a broad array of issues. This was deemed sufficient by the Alabama Supreme Court to preserve the issues, as shown by the fact that such court in fact considered the Constitutional issues raised before that court by Pacific Mutual, including the issue that Due Process requires an effective limit on the amount of punitive damages the jury may award.

established [Resp. Br. 20-21]. Respondents also contend that recent studies show that in fact there has been no increase in the frequency or size of punitive damages awards [Resp. Br. 23-24]. Respondents then contend that the matter should be left to state legislatures and courts to remedy [Resp. Br. 24].

Contrary to Respondents' position, the longevity of a doctrine does not establish its compliance with Constitutional requirements.

In *Williams v. Illinois*, 399 U.S. 235 (1970), in which the Court invalidated the time-honored practice of extending the prison term of convicted defendants beyond the stated maximum for their offenses when they were unable to pay fines and court costs, the Court stated, at pages 239-240:

> ". . . [N]either the antiquity of a practice nor the fact of steadfast legislative and judicial adherence to it through the centuries insulates it from constitutional attack. . . .
>
> "The need to be open to reassessment of ancient practices other than those explicitly mandated by the Constitution is illustrated by the present case since the greatly increased use of fines as a criminal sanction has made nonpayment a major cause of incarceration in this country. . . ."

Here, while Respondents cite three studies for the proposition that there has been no increase in the frequency or size of punitive damages awards, such conclusion is contrary to common sense and simple observation. A review of the historical expansion of punitive damages awards in Alabama and California set forth in Appendix A to Petitioner's Brief, as updated in Appendix A-1 hereto, in Appendix E to Petitioner's Reply Brief to Respondents' Opposition to petition for writ of certiorari, and Appendices A and B to the *amicus curiae* brief herein of the Association For California Tort Reform, and a review of the analysis of punitive damages awards in the *amicus curiae* brief of the American Institute Of Architects, *et al.*, clearly demonstrates that

considerable change has occurred both in the frequency and amount of punitive damages awards.

Respondents' conclusion contrasts sharply with the observations of a California appellate justice on the judicial firing line while the transformation of punitive damages was taking place. In *Rosener v. Sears, Roebuck & Co.*, 110 Cal.App.3d 740 (1980), Justice Elkington filed a reluctant concurrence, expressing his observations on the changes in punitive damages law, as follows, at page 758:

> "I am fearful that the law of punitive damages as it has developed in this state no longer serves any public policy, or the legitimate interests of the unentitled recipients of its constantly accelerating largess."

Further, at page 760:

> "In California's history it had long been the rule that punitive damages were recoverable only where the defendant entertained 'the wrongful *personal intention* to injure' the plaintiff . . . and that the essential element of malice must be '"*actual malice* [denoting] ill will on the part of the defendant, or his desire to do harm for the mere satisfaction of doing it"' . . . . When properly awarded, punitive damages then had a modest relation to actual damages; 'the granting of them [was] done with the greatest of caution [and they were] only allowed in the clearest of cases.' . . .
>
> "But notwithstanding those restrictive and cautionary dicta, the bases, and frequency, and measure, of punitive damages have expanded far beyond the original legislative and judicial intent and, in my respectful opinion, far beyond reason and sound public policy."

Justice Elkington then analyzed the expansion of the size of approved punitive damages awards, finding that prior to

1959, the highest ratio of punitive to actual damages upheld in a California reported decision was approximately twice the actual damages [*id.* at page 760]. He then noted at page 761 that the proportionate relationship has continued to escalate until an award of 190 to 1 has been upheld.

Justice Elkington observed [*id.* at page 761] that "the *circumstances* under which punitive damages may be awarded have been widely expanded," now being allowed in "tortious" breach of contract actions and in many negligence actions.

Justice Elkington then reported his observation of the great increase in the frequency of punitive damages awards as follows, at page 762:

> "These and perhaps other reasons, I think, have brought about the present-day practice of seeking punitive damages in substantially all damage actions, and what will reasonably be termed the explosion of punitive damage awards. And such punitive damage awards are observed not to be generally confined to large corporations such as defendant Sears Roebuck & Company, or so-called 'wealthy' defendants. They are regularly returned also, against the 'average' defendants of damage actions."

Until about 1970, punitive damages were seldom sought and were infrequently awarded. Such awards were modest, and were imposed against intentional evil-doers. Even so, punitive damages doctrine has been controversial since virtually its inception. A number of courts have expressed doubt as to the propriety or validity of punitive damages,[2]

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[2] *Fay v. Parker*, 53 N.H. 342, 382 (1873); *Murphy v. Hobbs*, 7 Colo. 541, 545, 5 P. 119, 122 (1885); *Brown v. Swineford*, 44 Wis. 282, 286-288 (1877); *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, 453 (1868); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-841 (2d Cir. 1967).

while other courts rejected the doctrine entirely,[3] and still other courts have severely limited the availability of punitive damages.[4]

It is submitted that Respondents' argument that validity is conferred on punitive damages by historical survival to date is not well-taken.

Similarly, Respondents' suggestion that this Court abstain from considering the matter and leave any solutions to the state legislatures and courts, is without merit. A strong trend appears to be emerging for state supreme courts to invalidate even the limited restraints which state legislatures have attempted to place on some punitive damages awards.[5] A

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[3] *Hanna v. Sweeney*, 78 Conn. 492, 494, 62 A. 785 (1906); *Collens v. New Canaan Water Co.*, 155 Conn. 477, 488, 234 A.2d 825, 831-832 (1967). (Allows recovery only of compensatory damages, but includes expenses of litigation, less taxable costs); *Burt v. Advertiser Newspaper Co.*, 154 Mass. 238, 28 N.E. 1 (1891) (Holmes, J.); *City of Lowell v. Massachusetts Bonding Co.*, 313 Mass. 257, 269, 47 N.E.2d 265, 272 (1943); *Bruton v. Leavitt Stores Corp.*, 87 N.H. 304, 305, 179 A. 185, 186 (1935); *Larson v. Lindahl*, 167 Colo. 409, 411-412, 450 P.2d 77, 78 (1968); *Abel v. Conover*, 170 Neb. 926, 929, 104 N.W.2d 684, 688 (1960); *Miller v. Kingsley*, 194 Neb. 123, 124, 230 N.W.2d 472, 474 (1979); *Spokane Truck & Dray Co. v. Hoefer*, 2 Wash. 45, 56, 25 P. 1072, 1073-1074 (1891); *Standard v. Bolin*, 88 Wash.2d 614, 621, 565 P.2d 94, 98 (1977); *Breaux v. Simon*, 235 La. 453, 459, 104 So.2d 168, 170 (1958), Trans. 112 So.2d 121, 123 (La. Ct. App. 1959); *McCoy v. Arkansas Natural Gas Co.*, 175 La. 487, 497, 143 So. 383, 385-386 (1932), *cert. den.*, 287 U.S. 661 (1932).

[4] *Rookes v. Barnard* [1964] A.C. 1129, 1220, 1223, 1 All Eng. Rep. 367, 410-411; *Wise v. Daniel*, 221 Mich. 229, 190 N.W. 746, 747 (1922); *Hibschman Pontiac, Inc. v. Batchelor*, 266 Ind. 310, 362 N.E.2d 845 (1977); *Nicholson's Mobile Home Sales, Inc. v. Schramm*, 164 Ind. App. 598, 606, 330 N.E.2d 785, 790-791 (1975). Criticized in *Glissman v. Rutt*, 175 Ind. App. 493, 495, 372 N.E.2d 1188, 1190 (1978).

[5] Tort Reform Act overturned:

Arizona - *Kenyon v. Hammer*, 142 Ariz. 69, 688 P.2d 961 (Ariz. 1984).

Georgia - *McBride v. General Motors Corp.*, 737 F. Supp. 1563 (D. Ga. 1990).

Idaho - *Jones v. State Bd. Of Medicine*, 97 Idaho 859, 555 P.2d 399 (1976) [declined to decide on reconsideration, but intermediate scrutiny test

(continued)

decision by this Court would assist, not impede, state reforms. Also, Pacific Mutual is entitled to Due Process in this case.

3. Alabama Law, And The Jury Instruction Below Which It Authorized, Conferred Arbitrary, Discretionary Power On The Jury To Determine Punishment In Violation Of Pacific Mutual's Rights Under The Due Process Clause.

Respondents contend that the jury instruction below was valid under Due Process because it focused the jury's attention on the punishment purpose of the award, and advanced Alabama's interest in flexible, individualized punishment [Resp. Br. 25-27]. Respondents also contend that the unpredictable, unlimited nature of the awards furthers state objectives by preventing would be wrong-doers from predicting and internalizing the penalties for wrongdoing [Resp. Br. 26].

Rather than accommodating, as Respondents contend, Pacific Mutual's interest in rational and fair decisionmaking, and Alabama's interest in individualized deterrence and retribution, the jury instruction in this case was

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(ftn. continued)
announced, and placed burden of defendants to show correlation between Act and availability of health care].

Kansas - *Farley v. Engelken*, 241 Kan. 663, 740 P.2d 1058 (Kan. 1987);

New Mexico - *Richardson v. Carnegie Library Restaurant*, 763 P.2d 1153 (1988).

Montana - *Pfost v. State*, 219 Mont. 206, 713 P.2d 495 (Mont. 1985).

Texas - *Lucas v. U.S.*, 757 S.W.2d 687 (Tex. 1988).

Washington - *Sofie v. Fibreboard Corp.*, 112 Wash. 636, 771 P.2d 711 (Wash. 1989).

Upheld:

California - *Fein v. Permanente Med. Group*, 38 Cal.3d 137, 695 P.2d 665 (Cal. 1985) [*app. dismissed*, 474 U.S. 892].

"incomprehensibly vague and unintelligible" as a guide to jurors in determining the amount of punishment to impose.[6] Alabama law allowed the particular twelve people sitting as the jury to determine punishment as they saw fit, with no other guide than to consider the "character and degree of the wrong" and the "need for deterring similar wrongs." As Justice Brennan noted in *Browning-Ferris Industries Of Vermont, Inc. v. Kelco Disposal, Inc.*, 109 S.Ct. 2909 (1989), at page 2923:

> "Guidance like this is scarcely better than no guidance at all . . . The point is . . . that the instruction reveals a deeper flaw: the fact that punitive damages are imposed by juries guided by little more than an admonition to do what they think is best."

While this Court has recognized the propriety of flexibility and discretion in sentencing, that recognition has been in the context of cases in which the punishable conduct was defined, and the range of permitted punishment fixed by statute. This was recognized by this Court in *Giaccio v. Pennsylvania*, 382 U.S. 399 (1966), wherein the Court specifically stated that the holding in that case was not intended to call into question the practice of some states to allow juries to fix sentences within legislatively permitted ranges [382 U.S. at page 405 n. 8].

In *Schall v. Martin*, 467 U.S. 253 (1984), relied upon by Respondents, this Court upheld trial court discretion to order pretrial detention if it found a likelihood that the juvenile would commit a crime if not detained. There, the length of detention was limited to the amount of time which would elapse between the pretrial detention hearing and the trial. A

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[6] *Charter Hospital of Mobile, Inc. v. Weinberg*, 558 So.2d 909, 1990 Ala. Lexis 17 (Jan. 12, 1990), [Houston, J., concurring at 1990 Ala. Lexis 17, pages 20-23, and expressing his view of a substantially identical instruction].

determination of the likelihood that a defendant would commit a crime prior to his or her court appearance is different in kind from determining, as a matter of first instance, the punishment to be imposed for given conduct.

Respondents argue that in noncapital offense cases, states are free to give untrammeled discretion in sentencing to the judge or jury, citing statutes supposedly giving total discretion to fix sentences at "any number of years" [Resp. Br. 41].

However, the flexibility given in noncapital offense cases is discretion within the maximum sentence prescribed by the legislatures.

The states which authorize sentences for "any number of years" in fact set ranges of permitted punishment. For example, in *Stevens v. Armontrout*, 787 F.2d 1282 (8th Cir. 1986) relied upon by Respondents [Resp. Br. 41, n. 63], the statute provided that defendants convicted of first degree murder could be sentenced to death, and that a defendant convicted of second degree murder was subject to "imprisonment during his natural life, or for any number of years" not less than ten. The defendant's sentence was for 200 years, which the Court of Appeals found to be effectively a life sentence [787 F.2d at 1283-1284]. The Michigan, Virginia and District of Columbia statutes cited are similar to that in *Armontrout*.

Respondents' argument that states can give unfettered discretion to fix punishment is not supported by the authority they cite.[7] Discretion and flexibility within a legislatively prescribed range of punishment is different in kind from the arbitrary power given to juries in Alabama and other states to determine the amount of punishment to be imposed by

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[7] In *Standard Oil Co. of Indiana v. Missouri*, 224 U.S. 270 (1912), relied upon by Respondents [Resp. Br. 22], this Court considered the antitrust fine in question to be punitive damages, and accepted the propriety of discretion to fix such awards, subject to review for excessiveness. The Constitutional validity of punitive damages was not before the Court.

punitive damages awards, in the total absence of any suggestion of a permitted range of punishment.

It is this absence of prior governmental action in Alabama to set the range of permitted punishment which invalidates the award against Pacific Mutual in this case. This absence was aggravated by the lack of any other guidance to the jury on how to determine whether Pacific Mutual merited punishment, and if so, how much.

Respondents' contention that the unlimited and unpredictable nature of punitive damages is justified by the asserted deterrent effect thereof, misses the point. Due Process requires that the range of permitted punishment be set in advance of conduct, not to allow potential offenders to perform a cost/benefit calculation, but rather, to protect citizens from arbitrary and discriminatory punishment.

It is submitted that the guidance given to the jury below was inadequate in violation of Pacific Mutual's Due Process rights.

4. Post-Trial Review By The Trial Judge And Appellate Court Did Not Cure The Due Process Defects At The Trial Stage Of The Proceedings Below.

Respondents contend that any invalidity in the proceeding below caused by conferring standardless discretion upon the jury to determine punishment was cured by post-trial review at the trial court and appellate levels [Resp. Br. 28-38], particularly in view of the *Hammond*[8] procedures announced in Alabama to review punitive damages awards [*id.*].

[8] *Hammond v. City of Gadsden*, 493 So.2d 1374 (Ala. 1986); *Green Oil Co. v. Horn by*, 539 So.2d 218 (Ala. 1989).

As pointed out in Petitioner's Brief at pages 41-46, the damage is done at the trial level, by the absence of standards and a prescribed range of permitted punishment. The *Hammond* standards amount only to a "gentle test of excessiveness" based upon the subjective, visceral reactions of each judge or justice [*see Rummel v. Estelle*, 445 U.S. 263, 275 (1980), Burger, C.J., dissenting].

Additionally, the unconstitutionality of a law, such as Alabama punitive damages law, cannot be cured by a procedure for review of decisions made thereunder [*Baggett v. Bullitt*, 377 U.S. 360, 373 (1964)]. Unless the jury standards are clear, no meaningful judicial review can be conducted to determine whether the standards were adhered to [*See Roberts v. United States Jaycees*, 468 U.S. 609, 629 (1984)]. Review of jury determinations made with reference to guidance as "incomprehensible and unintelligible" as that given in Alabama, merely transfers discretion to the reviewing courts.

The situation in Alabama is worsened by the fact that review, even under *Hammond* standards, is still deferential, and presumes that the jury verdict was correct. Justice Houston of the Alabama Supreme Court noted that Alabama's interpretation of the right to a jury trial in the Alabama Constitution requires even greater deference to jury determinations than that given by most states, which contributed to his conclusion that post-trial review could not cure the Constitutional deficiencies at the jury level.[9]

Unless judicial review amounts to a *de novo* trial of the issues and a determination of the punitive award upon a Constitutionally proper basis, judicial review could not cure the defects in the jury decision. Alabama review under *Hammond* criteria is not a trial *de novo*. As noted by the *amicus curiae* brief herein of the Alabama Defense Lawyers

[9] *Charter Hospital Of Mobile, Inc. v. Weinberg*, 558 So.2d 909, 1990 Ala. Lexis 17 (1990), at 1990 Ala. Lexis, p. 19.

Association, post-trial review under *Hammond* has not resulted in any meaningful modification of the law. This is exemplified by the affirmance of the verdict in this case by the Alabama Supreme Court, primarily on the basis that jury verdicts are presumed to be valid [Pet. Cert., B 13].

In *Land & Associates, Inc. v. Simmons*, 562 So.2d 140 (Ala. 1989), cited by Respondents [Resp. Br. 31], the trial court remitted a $2,500,000 award to $600,000, stating, " 'The problem here is that $2,500,000 is simply too much for the conduct of which defendants were guilty' " [*id.* at 28]. The court went on to state that considering the gravity of the wrong, the injury to plaintiff, and comparing other awards, the award should be reduced to $600,000. The Alabama Supreme Court affirmed, on the grounds that awards which shock the conscience of the court may be considered to be excessive, and the trial court's consideration of the gravity of the wrong, the injury to plaintiff, and other awards satisfied *Hammond*.

Similarly, in *United States Automobile Association v. Wade*, 544 So.2d 906 (Ala. 1989), the trial court denied a motion for remittitur, after a bench trial. The Alabama Supreme Court ordered a remittitur of $1,000,000 on the grounds that the $3,500,000 award was excessive [544 So.2d at 917].

It is apparent that *Hammond* review in Alabama amounts to no more than a subjective test of excessiveness, transferring essentially unlimited discretion to the reviewing courts, in the absence of a prior prescription of the permitted range of punishment.

Alabama's procedures in this case, in sum and in part, failed to comply with the requirements of the Due Process Clause of the Fourteenth Amendment.

5. The Requirements Of Fundamental Fairness And Notice Included In The Due Process Clause Apply To The Amount Of Punishment As Well As Fair Notice Of Prohibited Conduct.

Respondents appear to contend that the requirements of Due Process apply only to definitions of prohibited conduct, but that unlimited discretion to impose punishment can be conferred upon courts or juries in determining sentences [Resp. Br. 38-43].

Respondents appear to contend that discretion to impose a life sentence, or a lesser term of years, is unlimited discretion. All of the statutes cited by Respondents set forth legislative upper limits of punishment, which as to some serious crimes, was either death, life imprisonment, or a lesser term of years, usually with a minimum stated.

It is this lack of a governmental determination of the upper limit of punishment in the punitive damages law of Alabama and most other states, which distinguishes it from the authorities relied upon by Respondents. Due Process requires that defendants be protected from arbitrary, discriminatory establishment of the degree of punishment after the fact. [*See United States v. Batchelder*, 442 U.S. 114, 123 (1979); *Miller v. Florida*, 482 U.S. 423, 429, 435-436 (1987); *Giaccio v. Pennsylvania*, 382 U.S. 399, 401-403 (1966); *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 390-391 (1798).]

It is submitted that Due Process requires that permissible ranges of punishment be prescribed in advance of the conduct to be punished by punitive damages awards. Alabama's failure to do so requires that the award herein be vacated.

B. The Award Of Punitive Damages Against Pacific Mutual For The Fraud Of Mr. Ruffin Acting With Respect To The Medical Insurance Policy Of Another Company, And Against The Interests Of Pacific Mutual, Violated Due Process.

Respondents appear to contend that Pacific Mutual was negligent in failing to control Mr. Ruffin, and actively contributed to the success of Mr. Ruffin's fraud by not sending the lapse notices regarding the Pacific Mutual life insurance policies to the individual Respondents [Resp. Br. 4-7].

Respondents then contend that liability without fault is proper in all cases, and that punishment may be inflicted on a principal in the absence of benefit or intent to benefit by the agent. This argument is based primarily on the assertion that if fault were required, companies would be encouraged not to supervise agents [Resp. Br. 11-17].

It should first be noted that no evidence showed notice to Pacific Mutual's home office of Mr. Ruffin's conduct, even were Ms. Ault's testimony to be fully credited. At most, notice to Mr. Lupia was shown. Even here, Ms. Ault was not able to say that the instances she related involved Pacific Mutual policies or policyholders [Pet. Reply Cert. A11-14]. The assertion by the Alabama Supreme Court that notice to Pacific Mutual's home office was shown is without any support in the record.

It should also be noted Pacific Mutual in fact sent its lapse notices directly to Respondents [R.T. 836-837, and the lapse notices from Trial Exhibit 14, attached hereto as Appendix B-1 through B-4]. Respondents' argument that Pacific Mutual contributed to the success of Mr. Ruffin's alleged fraud is incorrect.

Respondents rely upon *American Society Of Mechanical Engineers v. Hydrolevel Corp.*, 456 U.S. 556 (1982); and *Louis Pizitz Dry Goods v. Yeldell*, 274 U.S. 112 (1927) for

the proposition that punitive damages can be imposed without benefit or intent to benefit the principal.

In each of those cases, this Court found that the primary purpose of the awards was remedial and compensatory, not punitive, and therefore distinguished those cases from the requirements of purely punishment cases. Further, in *Hydrolevel*, this Court relied in part upon Restatement Agency 2d Section 217C, Comment c, which states that the rule limiting a principal's liability for punitive damages does not apply to special statutes giving treble damages. This was recognized in *Union City Barge Line, Inc. v. Union Carbide Co.*, 823 F.2d 129 (5th Cir. 1987), in which the court concluded that Hydrolevel did not authorize vicarious liability for agents' acts which harmed the principal.

It should also be noted that under settled law, the Respondents had the insurance coverage for which they paid premiums to Mr. Ruffin. To the extent Mr. Ruffin collected the premiums, the companies were bound. Had Mrs. Haslip, for example, submitted a claim to Union Fidelity, that company would have been bound to pay the claim [*National Life Ins. Co. v. Reedy*, 115 So.2d 8 (Ala. 1927); Couch on Insurance 2d (Rev. Ed.) Section 31:125].

However, Respondents elected not to contact the companies, but to file suit.

Respondents also fail to distinguish between vicarious liability for compensatory damages, and vicarious liability for punishment.

Mr. Ruffin had authority to sell policies. That scope of authority, however, did not extend to stealing premiums from the companies. As noted, each company was liable on its respective policy for the coverage paid for by Respondents, but was deprived of the premiums by Mr. Ruffin's acts. It is an entirely different matter to assert that Pacific Mutual should be punished because Mr. Ruffin misappropriated premiums from it and from Union Fidelity.

It is submitted that the authorities cited and discussed by Pacific Mutual in its Brief Of Petitioner are controlling, and that Due Process does not allow punishment to be imposed upon Pacific Mutual for Mr. Ruffin's acts under the circumstances of this case.

It is also submitted that the grounds upon which Pacific Mutual asserts that it cannot be punished in this case under Due Process do not require any dismantling of existing regulatory criminal enforcement programs, as Respondents assert.

While substantial questions can be raised regarding the Constitutional viability of crimes without *mens rea*, and punishment without fault [*see, e. g.*, Hippard, "The Unconstitutionality Of Criminal Liability Without Fault: An Argument For A Constitutional Doctrine Of Mens Rea," 10 Houston L.Rev. 1039 (1973)], it is not necessary to reach those issues here. Pacific Mutual's position merely seeks application of the basic rule established in *New York Central and Hudson River R.R. Co. v. United States*, 212 U.S. 481, 495 (1909), that benefit to the company, or intent to benefit the company, is a necessary prerequisite to imposing punishment on a vicarious liability basis.

Mr. Ruffin was not acting in the business of Pacific Mutual when pocketing the premiums on the Pacific Mutual and Union Fidelity insurance policies, and clearly had no intent to benefit either company by misappropriating premiums due them, while binding them to the policy risks.

It is submitted that Due Process requires that the award against Pacific Mutual be vacated.

C. Additional Trial Safeguards Are Required By Due Process In Punitive Damages Cases.

Respondents contend that no enhanced burden of proof or other trial safeguards are required in punitive damages cases [Resp. Br. 46-48].

What Respondents ignore is the dynamics of punitive damages cases. As here, plaintiffs are less interested in obtaining contract or other benefits (Respondents did not bother to claim benefits) than in asserting a punitive damages claim so they and their attorneys can play courtroom roulette.[10] Both plaintiffs and their counsel have a primary interest in obtaining a windfall award. The defendants are usually unpopular, target defendants, such as insurance companies, banks and employers.

All of this creates a significant risk of improper fact finding. As noted by the Indiana Supreme Court in *Travelers Indemnity Co. v. Armstrong*, 442 N.E.2d 349 (Ind.S.Ct. 1982), discussing the appropriate burden of proof in punitive damages cases, at page 363:

> "Neither should it be assumed that one who stands to reap the harvest of a punitive damage award will, in all cases, himself be reasonable and forthright. . . ."

This is demonstrated in this case by the significant one hundred eighty degree shifts in Mrs. Haslip's testimony at the trial, from her previous deposition testimony [J.A. 47-62].

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[10] *See Eichenseer v. Reserve Life Ins. Co.*, 894 F.2d 1414 (5th Cir. 1990) [Jones, J., dissenting from denial of rehearing *en banc*, in which he stated, at page 1422: "One of the most unseemly features of our current legal system is its tendency to promote litigation as high-stakes gambling. . . . Punitive damages are a key feature of the abuse of the litigation process."]

It is submitted that the additional procedural protections suggested by Pacific Mutual are required by Due Proces to improve the reliability of fact finding and decision making in these cases.

D. The Award Herein Was Excessive In Violation Of Pacific Mutual's Due Process Rights.

Respondents' arguments that the award herein is justified when measured by the standard used to evaluate economic regulations [Resp. Br. 43-46] are without merit.

Punitive damages are not economic regulations. They are fines imposed to further a public interest in punishment. As such, the award, and the substantive law and procedures under which it was imposed, should properly be subjected to heightened scrutiny.

Solem v. Helm, 463 U.S. 277 (1983), attempted to introduce objectivity into excessiveness/proportionality review. Such a review of punitive damages would properly consider legislative criminal and civil penalties for similar conduct. Respondents' contention that such penalties are set in anticipation of supplemental punitive damage enforcement is derived wholly from thin air.

It is submitted that the award below was excessive, in violation of Pacific Mutual's Due Process rights.

CONCLUSION

Respondents have asserted a number of propositions which are not supported by the authority relied upon. Further, none of the arguments advanced refute the basic points asserted by Pacific Mutual.

Present punitive damage law in Alabama and most other states is fundamentally unfair. It authorizes vague, incomprehensible and ineffective jury instructions which give no guidance as to whether punishment is merited and if so, how much. It fails to set limits on jury or court discretion by limiting the awards which may be made by prior prescription of a permitted range of punishment. Even if the Alabama jury instruction had contained each of the *Hammond* criteria, the discretion of both the jury and reviewing courts would remain so broad that juries would still be free to render awards based upon their individual backgrounds, temperaments and societal concerns. As noted in *Michigan C.R. Co. v. Vreeland*, 227 U.S. 59, 71-74 (1913), this throws "the door open to the widest speculation. . . . These experiences, which were to be the standard, would, of course, be as various as [the jurors'] tastes, habits and opinion."

It is submitted that the Due Process Clause of the Fourteenth Amendment requires prior establishment of a permitted range of punishment by awards of punitive damages. Because of the broad range of conduct and fact situations which may be found to subject a party to such awards, it would appear that some substantial tailoring of fines to categories of conduct would also be necessary to make the system operate fairly and rationally. Otherwise, each award would still raise a claim of excessiveness under either Due Process or the tests in *Solem v. Helm*, 463 U.S. 277 (1983).

Because of the ambiguous context in which these cases frequently arise, regarding whether or not punishable conduct has occurred, some further guidance to juries appears

necessary for making determinations within the specified permitted range of punishment.

It is submitted that the award of punitive damages herein should be vacated as violating the rights of Pacific Mutual under the Due Process Clause of the Fourteenth Amendment. Such an order would not Federalize state punitive damages law. It would merely require that the appropriate state authority define the punishable conduct and set the permitted ranges of punishment, therefore, prospectively, and that juries be properly guided. The resulting standards would be reviewable if necessary under *Solem v. Helm*, 463 U.S. 277 (1983).

Respectfully submitted,

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Attorneys for Petitioner
Pacific Mutual Life Insurance Company

APPENDIX A

PARTIAL LIST OF ALABAMA JURY VERDICTS AWARDING PUNITIVE DAMAGES OF $500,000 OR MORE FROM JANUARY 1, 1990 TO AUGUST 7, 1990[1]

(* indicates wrongful death case)

1.	*Wilburn v. Luxaire, et al.* Mobile County Circuit Court CV-88-147 *et seq.* (April, 1990) $50,000,000 punitive damages, plus previous settlement of $11,500,000 for wrongful death of five-member family resulting from alleged negligence involving heating unit.	$50,000,000*
2.	*Helen Lewis Johnston, as parent and custodian of Barton Lewis Griffin, deceased, and Ford Lewis v. L. B. Chapman, B. W. Wilson & Sons, and General Motors Corp.* Marengo County Circuit Court CV-88-117 (August 3, 1990) Wrongful death of child. Alleged defective product in vehicle computer system. Verdict against General Motors only. Post-trial motions pending.	15,000,000*

[1]This is a correction and update to Appendix 1 of Petitioner's main brief. The lists are in all likelihood still incomplete due to the lack of any central record or reporting system as to jury verdicts in Alabama. Magnifying the significance of these lists is the fact that 90% to 95% of all civil cases are settled. Obviously, the mushrooming number and size of punitive damage verdicts impact tremendously on the money paid in those settlements.

3. *Overstreet v. Insurance Company of North America, et al.* — $10,000,000
Mobile County Circuit Court
CV-86-002312 (June 8, 1990)
Alleged insurance fraud.
$10,000,000 punitive damages award against agency, individuals dismissed.

4. *Annie B. Smith v. MBL Life Assurance Corp. and Mutual Benefit Life Insurance Co.* — 4,500,000
Jefferson County Circuit Court
CV-84-3028 (June 1990)
$4,500,000 punitive damages and $250,000 compensatory damages in breach of contract, fraud and bad faith case on question of existence of life insurance policy.
Post-trial motions pending.

5. *Sue Chumney as Administrator of the Estate of Christopher E. Long, deceased v. Flowers Hospital* — 3,000,000*
Houston County Circuit Court
CV-87-587 (1990)
Wrongful death of child.
Settled post-trial.

6. *Tate v. P.P.G. Industries* — 2,500,000*
U.S. District Court for the Southern District of Alabama
(February 19, 1990)
Punitive damages for wantonness in wrongful death case.

7. *Shelby King v. Pioneer Life Insurance Co.* — $ 2,000,000
Escambia County Circuit Court
CV-87-152 (July 31, 1990)
Breach of contract and bad faith suit.
$2,000,000 verdict includes approximately $23,000 compensatory damages and $1,977,000 punitive damages for breach of contract.
Appeal pending.

8. *Burden v. Empire Fire & Marine Ins. Co.* — 1,400,000
Lauderdale County Circuit Court
CV-88-244 (March 2, 1990)
Alleged bad faith for failing to settle uninsured motorist claim.
$400,000 awarded for compensatory damages and $1,000,000 for punitive damages.
Post-trial motions pending.

9. *American Employers Insurance Company v. Southern Seeding Services, Inc., et al.* — 1,150,000
U.S. District Court for the Northern District of Alabama
CV-87-G-0294S
Verdict awarding $400,000 in compensatory damages and $750,000 in punitive damages on February 22, 1990.
Appeal filed March 27, 1990.

10. *Tom Beaty, Jr. v. Ford-New Holland Tractor Co. and Larry Lilly* — $ 1,025,000
Barbour County Circuit Court, Clayton Division
CV-89-012 (August 7, 1990)
Verdict awarding $25,000 in compensatory damages and $1,000,000 in punitive damages in malicious prosecution suit.

11. *Fuller v. Preferred Risk Life Insurance Co.* — 1,016,765.82
Montgomery County Circuit Court
CV-88-744M (February 7, 1990)
Alleged breach of contract and insurance fraud.
$16,764.82 compensatory damages on breach of contract; $1,000,000 punitive damages and $1.00 compensatory damages on fraud count.
Punitive damages remitted to $250,000 on Motion for JNOV/New Trial.
Appeal Pending.

12. *Braden v. Dorsey Motor Sales, Inc.* — 1,000,000
Autauga County Circuit Court
(April 3, 1990)
$1,000,000 punitive damages, $15,600 compensatory damages for alleged fraudulent misrepresentation by car dealer that a used car was "new."

13. *William Thornton v. Yamaha Motor Co., Ltd., et al.* — $ 750,000*
Montgomery County Circuit Court
CV-88-1639-TH (April 18, 1990)
Wrongful death.
No appeal pending.

APPENDIX B

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6097 0
INSURED: CYNTHIA E. CRAIG
PREM. MODE: MONTHLY
PREMIUM: 13.40

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	24	64	10	1

MAILING NAME AND ADDRESS
CYNTHIA E. CRAIG
531 BOOKER STREET
ROOSEVELT AL 35020

SERVICE OFFICE
PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT
RUFFIN LEMMIE L JR

POLICY INFORMATION

YOUR POLICY HAS NO VALUE TO BE USED TO EXERCISE THE NON-FORFEITURE OPTION AND ALL PROTECTION HAS CEASED

THE AUTOMATIC PREMIUM LOAN PROVISION DID NOT APPLY BECAUSE THE POLICY'S VALUE WAS INSUFFICIENT TO PAY THE PREMIUM

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6106 0
INSURED: EDDIE HARGROVE
PREM. MODE: MONTHLY
PREMIUM: 32.70

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	47	64	10	1

MAILING NAME AND ADDRESS
EDDIE HARGROVE
3109 CLAREDON AVE
BESSEMER AL 35020

SERVICE OFFICE
PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT
RUFFIN LEMMIE L JR

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PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6104 0
INSURED: ALMA M. CALHOUN
PREM. MODE: MONTHLY
PREMIUM: 19.70

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	36	64	10	1

MAILING NAME AND ADDRESS
ALMA M. CALHOUN
2214 IVEY ST
ROOSEVELT CITY AL 35020

SERVICE OFFICE
PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT
RUFFIN LEMMIE L JR

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THE AUTOMATIC PREMIUM LOAN PROVISION DID NOT APPLY BECAUSE THE POLICY'S VALUE WAS INSUFFICIENT TO PAY THE PREMIUM

PACIFIC MUTUAL
FINAL STATEMENT — LAPSED POLICY

DATE OF LAPSE: DEC 01 1981

POLICY NO.: 204 6100 0
INSURED: CLEOPATRA HASLIP
PREM. MODE: MONTHLY
PREMIUM: 29.40

Agent	Agency	Issue Yr.	Age	Bill Type	Own'r Code	Caut.
00Y6X	362	81	46	64	10	1

MAILING NAME AND ADDRESS
CLEOPATRA HASLIP
318 WOODWARD AVE
ROOSEVELT CITY AL 35020

SERVICE OFFICE
PACIFIC MUTUAL
BIRMINGHAM-LUPIA AGENCY
530 BEACON PARKWAY WEST
BIRMINGHAM AL 35259

SERVICING AGENT
RUFFIN LEMMIE L JR

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